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SUPREME COURT OF THE UNITED STATES

74-1512

No. _____

JOSEPH RAYMOND VITTITOW - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

No. ———

JOSEPH RAYMOND VITTITOW - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - *Respondent*

PETITION FOR A WRIT OF CERTIORAI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Joseph Raymond Vittitow, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the conviction of the Petitioner in the Warren Circuit Court at Bowling Green, Kentucky.

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The opinion of the Court of Appeals of Kentucky was a memorandum opinion, not to be cited as authority, which will not be reported. It is printed in the Appendix to this petition at page 1a. The mandate of the Court of Appeals of Kentucky denying the Petitioner's motions for rehearing appear in the Appendix at pages 9a-11a.

JURISDICTION

The Judgment of the Court of Appeals of Kentucky was entered on October 25, 1974. A timely petition for rehearing and supplemental petition for rehearing (due to change of counsel) were denied on February 21, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1275 (3).

QUESTIONS PRESENTED

I. **Whether the Petitioner was denied his fourteenth amendment right of due process of law because he was convicted of a crime in the absence of evidence proving one of the essential elements of the offense?**

II. **Whether the Petitioner was denied his fourteenth amendment right of due process of law where the trial Judge allowed admitted into evidence the fruits of a warrantless search of Petitioner's automobile?**

III. **Whether the Petitioner was denied his fourteenth amendment right of due process of law where the trial Judge allowed admitted into evidence exhibits and testimony regarding photographs which were not shown to defense counsel until the midst of the trial?**

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of cit-

izens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Joseph Raymond Vittitow, was indicted for storehouse breaking and grand larceny relating to a break-in of a drugstore in the small Warren County community of Smiths Grove in the early morning hours of August 22, 1973.

Separately indicted on the same charges arising out of the same incident were one Eugene Byrns and one James Stillwell. Byrns pled guilty, but Stillwell was still at large on the date of Vittitow's trial. Vittitow was tried alone. Co-defendant Byrns didn't testify at the trial and no eyewitnesses identified Vittitow as a participant in the break-in. The case for the prosecution was solely circumstantial.

The drugstore was owned and operated by a Mr. Bevarly who lives four and a half blocks from his store (Transcript of Evidence, hereinafter T.E., p. 75). Around 1:30 on the morning of August 22, 1973 Beverly was signalled by an alarm system in his store (T.E. 77). While his wife called the sheriff, he ran to the store, gun in hand. Arriving at the rear of the store, he saw three silhouettes of men as they came up on the roof from a small hole (T.E. 155) which had been torn in it (T. E. 83). He alerted them of his presence, and two men jumped off the roof on the side of the

building away from Bevarly, leaving a distinct boot print in the ground (T.E. 82-84). The third man, Byrns, jumped off the roof close to Bevarly, and so Bevarly, with his shotgun, captured him and held him until the authorities arrived (T.E. 82-83, 85-86, 88). Meanwhile, a neighbor responding to a call from Bevarly's wife, drove up in front of the store. As his car's lights shone on the store's window, he saw three, unidentifiable men inside the store, scurrying toward the rear where the small hole in the roof was later found (T.E. 128-130).

When the sheriff's officers and the Smiths Grove Chief of Police arrived, an inspection of the premises disclosed that a sizeable quantity of wrist watches and drugs had been assembled under the roof hole apparently in preparation for asportation (T.E. 167). Also discovered and carefully preserved, was a distinct boot print in the dirt, probably made by one of the burglars when jumping off the roof (T.E. 160, 98). A photograph was made of this boot print and introduced at trial (T.E. 64-65).

When the authorities arrived at the scene they searched the captured Byrns. Found on him were several watches and drugs which came from the drugstore (T.E. 100-165-6). Later, clothing worn by Byrns was placed under laboratory analysis, and particles of ceiling tile and wood fibers found on him matched the tile and fibers around the hole in the store roof (T.E. 71-75).

Within a short time after the authorities arrived at the store, Chief of Police Denham was sent in his

car to survey the community in search of the suspects remaining at large. After scouting several blocks with his search light, Denham noticed a car turning toward him off of another street. The car, coming from a direction away from the drugstore (T.E. 150), turned onto the street on which Denham was traveling, turned off its lights, pulled to the side of the street and parked. The only occupant, Vittitow, got out and walked toward a nearby house (T.E. 140-1). Chief Denham drove up to the parked car and called out to him. Subsequently, Vittitow walked over to Denham's car and in response to questioning, explained that he was hunting water for his car which he believed to be hot. Seeing no steam from Vittitow's car and suspecting the stranger's story (Vittitow was from Louisville), Denham directed him to get in the police car. Vittitow did as directed without any resistance, and was taken to the drugstore (T.E. 13-15).

At the store, Deputy Woods from Bowling Green came up and asked Vittitow to raise his right foot up, whereupon once he did, Major Woods placed him under arrest for storehouse breaking (T.E. 15, Testimony of Chief Denham). Major Woods, on the other hand, recalled that Vittitow was not placed under arrest for about twenty minutes after Denham brought him to the drugstore (T.E. 114). Within minutes (T.E. 117) of the "official arrest" Vittitow was placed in a police vehicle and taken to the county jail in Bowling Green. Just before or just after he was put in the police car, Major Woods sent Chief Denham back to the parked car of Vittitow's to search it (T.E. 116-8). Prior to

that a search of his person had been effected, and nothing was found on him (T.E. 119 and 73-4).

However, in Vittitow's car Denham found two billfolds; one containing papers identifying Byrns and the other, Stillwell (T.E. 118, 163-5). (No connection of Stillwell with the burglary was ever shown).

Approximately six weeks prior to trial, Vittitow filed motions for discovery. (Court Transcript 7-8), requesting, inter alia, inspection of all exhibits which the Commonwealth intended to use at trial, and under the principle of *Brady* v. *Maryland*, 373 U. S. 83 (1963), all exhibits which the Commonwealth might have but did not intend to use at trial. The Commonwealth responded (Ct. Trans. 12) agreeing to inspection of appellant's counsel of its exhibits and stating, "Any photographs, exhibits, maps or diagrams in the possession of the Commonwealth will be used in the trial and entered into evidence." Appellant's counsel made an inspection of exhibits several days prior to trial pursuant to the circuit court's order directing production (Ct. Trans. 13; T.E. 122-3).

At trial, the Commonwealth introduced, over objections, a key purportedly taken from Byrns which fit the ignition of Vittitow's car. This key had not been shown to appellant's counsel until the morning of the second day of trial, about one hour before its introduction as evidence (T.E. 122-4).

At trial, the Commonwealth's introduced, over objections, a key purportedly taken from Byrns which fit the ignition of Vittitow's car. This key had not been shown to appellant's counsel until the morning

of the second day of trial, about one hour before its introduction as evidence (T.E. 122-4).

At trial, the Commonwealth's scientific expert and head of the mobile crime lab, Al Burnett, testified that he photographed the boot print found at the scene, and the photos were introduced into evidence (Commonwealth's exhibits 5 & 6, T.E. 64-5). The photographed boot print *did not match* the boots of Vittitow (Defendant's exhibit 1, T.E. 73, 187-8).

However, when faced with this difference between the photographed print and the boots of this appellant, Major Woods asserted there had been other boot prints at the scene, but the photographs of them did not come out clear enough (T.E. 160-1, 186-9). These unclear photos, or their existence, were never revealed to appellant's counsel until the trial testimony just cited; and they were not introduced into evidence or produced for inspection by counsel.

Prior to trial, appellant moved to suppress the two billfolds seized in the search of his car. A hearing was begun just before the trial and continued, during recesses, while the trial progressed. The motion was overruled (T.E. 1-37; 104-127).

The appellant renewed his suppression motion and moved for a judgment of acquittal, at the conclusion of the Commonwealth's case, because the evidence was insufficient to sustain a conviction. The motions were overruled (T.E. 204-7, 210), and the case was submitted to the jury, whereupon Vittitow was acquitted by the jury of the charge of storehouse breaking *but* convicted of grand larceny (Ct. Trans. 21; T.E. 236).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents a Substantial Constitutional Question of Whether the Conviction of a Criminal Defendant in the Absence of Evidence Proving One of the Essential Elements of a Crime is a Violation of Due Process of Law, the Resolution of Which is in Conflict Among the Various Federal and State Jurisdictions.

The jury in the trial below determined there was insufficient evidence to convict Raymond Vittitow of storehouse breaking, and acquitted him on that charge. But, the jury convicted him of grand larceny on the basis of proof by association of both Vittitow and Byrns with the automobile Vittitow was driving, contrary to KRS 433.220.[1]

There was no proof, whatever, of appellant Vittitow's association with the burglarized drugstore. Indeed, the evidence at trial effectively disproved any connection between Vittitow and the store:

(1) Three men were seen inside the store as the burglary was discovered (T.E. 129).

(2) Three men came up to the roof of the building to jump off (T.E. 82-3).

(3) The three men obviously descended into the store and came up to the roof through a torn two-foot square hole (T.E. 155).

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[1]KRS 433.220 Grand Larceny—Taking of vehicle without consent of owner. Any person guilty of larceny of money or other property of the value of one hundred dollars ($100) or more shall be confined in the penitentiary for not less than one (1) nor more than five (5) years. Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment. (1194, 2739g-58: amend. Acts 1962, ch. 245 § 1)

(4) The one man captured at the scene, Byrns, was covered with wood fibers and ceiling tile from the hole in the roof of the store (T.E. 68-73).

(5) No trace of fibers, tile, or any element from the store building was found on Vittitow, his clothes, or the car he was driving (T.E. 73-4; 175).

(6) The captured Byrns had his pockets and clothing filled with watches and drugs from the store (T.E. 100-1).

(7) Neither Vittitow nor the car he drove possessed any loot from the burglary (T.E. 120-1, 175).

(8) A boot print was made by a burglar jumping off the roof (T.E. 64-6; 98).

(9) Vittitow, who weighs 200 or more pounds and who was wearing boots did not make the boot prints (T.E. 192, 187, 73, 188).

(10) The two burglars who jumped off the roof and escaped ran away on foot (T.E. 84). The Smiths Grove Chief of Police, who has lived in that small community all his life (T.E. 124), learned when he arrived at the scene that the escaping burglars had been heard running toward the Oakland Road (T.E. 131). But, when it was pointed out to him that the Oakland Road was in the opposite direction from when Vittitow was driving when discovered, Chief Denton allowed that he was confused about the location of the roads around Smiths Grove, and the burglars had been heard running toward the Rocky Hill Road (T.E. 144-5), the opposite direction from where the car was.

(11) In any instance, Vittitow was arrested approximately one-half mile from the drugstore, coming

from a direction away from the store (T.E. 150). He was not puffing or perspiring as if he had been running on that August night (T.E. 142-3).

The Commonwealth *did* prove that a break-in occurred at the Smiths Grove Drugstore in the dark of August 22, 1973; and three men were involved, one of whom was Byrns.

Allowing the Commonwealth the benefit of some reasonable inferences, appellant Vittitow was shown to have been in Smiths Grove not long after the commission of the crime, driving an auto with out of county license plate, in which a wallet of Byrns was found (that is, assuming, arguendo, that the evidence complained of above was properly admitted. And it should be remembered that no evidence connected the auto to the crime in any way).

In the case of *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811, 814 (1971), Hodges was tried and convicted of breaking and entering a storehouse because he was caught hiding under a log on a January day in a nearby woods with the man who had been seen running from the victimized building. When Hodges and his companion were found behind the log they ran from the lawmen. When Hodges appealed, the Court reviewed a number of its decisions relating to circumstantial cases and sufficiency of evidence and concluded:

> ". . . It is obvious that strong suspicion of Hodges involvement in the crime arises from the circumstances shown. Suspicion alone is not enough. (Citations omitted) Hodges had no duty to explain why he was where the officers found him.

> There is nothing in the competent evidence which indicates that Hodges was at the crime scene, nor is there anything other than his being found with Moore five hours after the latter's flight from the store, tending to prove his complicity in the crime. These circumstances, suspicious though they are, do not point so unerringly to Hodges involvement as to warrant submission of the case to the jury."

Although Alonzo Hodges had been found guilty because (1) he associated with a criminal, (2) his association with that criminal was in a suspicious location at a suspicious time, and (3) he tried to run away when found together with the criminal. Yet, that was *not enough.*

Vittitow was found guilty of grand larceny because (1) the jury could readily infer that he had associated with Byrns (the wallet in his car), (2) his location not long after the crime was suspicious, and (3) just as Hodges had run, Vittitow denied knowing Byrns (T.E. 99). Thus, in this case, that was *not enough.*

In *Guthrie* v. *Commonwealth,* Ky., 508 S. W. 2d 40 (1974), the Court of Appeals held that suspicion of commission of felony is insufficient to authorize arrest. The Court went on to explain,

> "In *Johnson* v. *Commonwealth,* Ky., 443 S. W. 2d 20 (1969), we inadvertently indicated at page 22, that a police officer is authorized to arrest '* * * on suspicion of the commission of a felony * * *'. Suspicion alone is insufficient."

And the Court went on to cite KRS 431.005, the statute authority.

In *Shanks* v. *Commonwealth,* Ky., 504 S. W. 2d 709 (1974), the appellant argued that the warrantless search was not incident to a valid arrest, therefore the search was impermissible. And, until the police officers entered the motel room, their testimony disclosed that they had observed nothing which justified Shanks' arrest. "Since it (the arrest) was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." There having been no probable cause for arresting Shanks revealed by the adduced testimony, the items seized should not have been admitted into evidence. So the Court stated that the search and seizure could not be validated under any of the carefully drawn exceptions to the constitutional requirement of a warrant. The Court reversed the judgment.

In *Ralya* v. *Commonwealth of Kentucky,* Ky., 495 S. W. 2d 506 (1973), the Court of Appeals held that the rule on the sufficiency of circumstantial evidence to establish the corpus delicti is that it must be more consistent with guilt than with innocence; that in evidentiary matters the law looks for reasonable probabilities, and even in a criminal case a jury may properly believe that which the evidence fairly indicates to have been reasonably probable. The Court went on to say that though possession alone will justify conviction of theft (if the theft is proved), it will not suffice to prove a breaking and entering. (In that case

the defendant was convicted for breaking and entering and stealing a license plate.) The Court went on to affirm the lower court except as to the conviction for breaking and entering, for which they reversed, and stated that if the evidence be the same, the defendant shall be entitled to a directed verdict of acquittal.

In *United States* v. *Velasquez*, 396 F. 2d 1009, 1010 n.1 (5th Circuit, 1974) that Court stated that "In circumstantial evidence cases the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude. *Vick* v. *United States*, 5 Cir. 1954, 216 F. 2d 228, at 232." The Court noted in *Velasquez* that the appellants began correctly by recognizing the general rule that the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it.

Finally, on this point, probably the best case to parallel the case at bars is that of *United States* v. *Horton*, 488 F. 2d 374 (1973), in that the Court considered whether there was sufficient evidence in the record to sustain in the conviction of the co-defendant Jordan. The Court said that in circumstantial evidence cases, the trier of fact must "reasonably find that the evidence excludes every reasonable hypothesis, except that of guilt." Further, the Court stated that in measuring the sufficiency of evidence against this standard,

"we must affirm any conclusion that could be reached by reasonable minds". The record in that case demonstrated Jordan's proximity to the illegal substance and the person who had control over it, but the Court held it insufficient to sustain his conviction. They said: "Jordan denied knowledge of the existence of the heroin or of any transactions involving drugs. As previously stated, the attache case containing the heroin belonged to Horton *although it was found in Jordan's automobile* (emphasis ours). Furthermore, the evidence does not establish any type of 'working relationship' between the parties regarding the heroin but merely an association . . . we reverse and remand with instructions to enter a judgment of acquittal with *respect to defendant Jordan.*"

All of the evidence introduced by the Commonwealth did not add up to enough to produce more than a strong suspicion. That, as this Court has said so many times, is not enough; and the trial court should have sustained appellant's motion for a judgment for acquittal (T.E. 204-207, 210).

And that, as appellant has shown, was more than the Commonwealth was entitled to introduce. Without the billfolds, the fruit of the illegal search of the auto, and without the key found on Byrns, produced from hiding midway through the trial, the Commonwealth could not even charge guilt by association.

The verdict of the jury, acquitting appellant of storehouse breaking *but convicting him of grand larceny,* is especially confusing. It is apparent, that the jury concluded that Vittitow did not enter the drug-

store. But he was in Smiths Grove that night. The jury, it appears, determined that such unexplained association was too sinister to allow the appellant to go free. But, if the jury determined that the appellant was not at the store, as they did to render such a verdict, then the appellant should be freed. All evidence of the Commonwealth pointed to three participants in the burglary—no more. All three were inside the store. All three ran up to the roof and jumped off, and ran in different directions from where Vittitow was found. There is no foundation in evidence or reasonable inferences from the evidence to cogently support a "fourth man" theory, which the jury must have created. Therefore, the verdict is neither based upon nor sustained by sufficient, competent evidence, and it should be overturned.

II. The Admission Into Evidence of Fruits of the Warrantless Search of Appellant's Automobile Presents a Substantial Constitutional Question Concerning a Criminal Defendant's Fourteenth Amendment Due Process Right to a Fair Trial.

At the request or direction of the Police Chief, Vittitow left his car parked on the side of a street and rode several blocks (about a half-mile: T.E. 150-1) in a police vehicle to the drugstore. About twenty minutes after the Chief brought Vittitow to the scene of the crime, he was "officially arrested" (T.E. 114) and the Chief was sent back to the parked car to search it (T.E. 118).

The Chief asserted that after he got in the car, he found the billfolds of Byrns and Stillwell lying on the floorboard partially exposed and partially under the passenger seat. (This attorney has never known an item seized from under a car seat to be other than "partially exposed" to the view of the searching officer.) After finding the billfolds, the Chief returned to his police car and drove back to the drugstore, and delivered his find to Major Woods (T.E. 134-135).

One could argue that Major Woods effected the arrest of Vittitow in front of the drugstore twenty minutes after Vittitow's arrival. Or an argument could be sustained that the appellant was arrested by Chief Denham twenty minutes earlier, right after he accosted the stranger looking for water for his car. But these arguments would not be significant:

> "It may have been 10 minutes, as contended by the Commonwealth, before the search was made at the garage, or it may have been 10 hours. In this case the element of time is immaterial." *Commonwealth* v. *Lewis,* 309 Ky. 276, 217 S. W. 2d 625, 626 (1949).
>
> "The search was conducted without a warrant, without Senibaldi's (the appellant) consent, and outside his presence. *Thus it was an illegal search."* *Senibaldi* v. *Commonwealth,* Ky., 338 S. W. 2d 915, 919 (1960).
>
> "Evidence obtained by a search made after an arrest, but not made in the immediate presence of the arrested person or incident to the arrest is inadmissible . . . The search was made sometime after the arrest and after both appellant and the truck

had been brought to Morehead. It was not made incident to the arrest nor in appellant's immediate presence. It was prejudicial error to admit the evidence obtained as a result of the search." *Flannery* v. *Commonwealth,* Ky., 324 S. W. 2d 128, 129 (1959).

"We have several times held such evidence inadmissible where it was not made incident to an arrest or in the accused's immediate presence." *Tabor* v. *Commonwealth,* Ky., 380 S. W. 2d 245, 246 (1964).

The Court of Appeals of Kentucky has repeatedly held the principle in *Preston* v. *United States,* 376 U. S. 364, 11 L. Ed. 2d 777 (1964), before and since it was enunciated.

The Commonwealth, in the case at bar, sought support for this warrantless search on some basis other than as incidental to the arrest. But there is no support in law for that occasion:

"Warrantless searches are per se unreasonable under the Fourth Amendment to the Constitution of the United States 'subject only to a few specifically established and well-delineated exceptions which are jealously and carefully drawn.' Coolidge v. New Hampshire, 403 U. S. 443 . . . Our inquiry in this case is whether the warrantless search can be justified under one of these 'established and well delineated' exceptions."

"The Collidge case reaffirms the basic holding in Carroll v. United States, 267 U. S. 132 . . . that was approved in Chambers v. Maroney, 399 U. S. 42 . . . The Carroll decision was that contraband

> goods concealed and illegally transported in an automobile may be searched for without a warrant provided that 'the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.'" *Ison* v. *Commonwealth*, Ky., 471 S. W. 2d 712, 713-714, (1971).

The Commonwealth in the case at bar cannot support an assertion of reasonable cause to believe that contraband was being illegally transported, for the loot of the burglary was left in the drugstore by the discovered burglars when all three jumped off the roof and ran. Byrns, the captured one, had only a few stolen items in his pockets, and the tools involved were left on the roof (T.E. 64-5). Nothing was left to the burglars to transport in a car.

Security of the car cannot be cogently claimed a basis for Denham's (the Police Chief) return and search. He left the car unattended for at least twenty minutes while the officers at the crime scene decided whether they should "officially arrest" Vittitow. In addition, as soon as Denham found the billfolds in the car, he left it again, without any provision or concern for its security.

The record shows that "Vittitow's car" was in fact registered to another man, and not his own car (T.E. 170). Appellant's standing to challenge the search of this car may be contested. Yet there should be no question of his standing in the instant case, for in light of *Joseph* v. *Commonwealth*, Ky., 324 S. W. 2d 126

(1959), the Court held that the defendant who fled from a borrowed car had standing to challenge the subsequent warrantless search and reversed the conviction because the search was unreasonable.

In *Roaden* v. *Kentucky*, 93 S. Ct. 2796 (1973), the Court said: ". . . Where there are exigent circumstances in which police action literally must be "now or never" to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation" and "The Fourth Amendment proscription against 'unreasonable . . . seizures,' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. Coolidge v. New Hampshire, 403 U. S. 443, 471-472 . . . The question to be resolved is whether the seizure of the film without a warrant was unreasonable under Fourth Amendment standards and, if so, whether the film was therefore inadmissible at the trial. The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves' . . ."

Petitioner reiterates that there were no fruits of a crime in the car, for the "fruits" were on the captured Byrns or in and on the drugstore. Nothing was left for transportation in a car.

One last argument on this point involves the ready availability of judicial officers for application for a search warrant in this instance. The city judge of Smiths Grove lives only a few blocks from the scene

of the crime (T.E. 125-6). And a magistrate of Warren County lives about a mile outside the community. The chief of police would have had no difficulty locating either (T.E. 126).

Johnson v. *United States*, 333 U. S. 10 at 13-14, 92 L. Ed. 436 at 440 (1948), Justice Jackson for the majority, noted:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

III. The Admission Into Evidence of Exhibits and Testimony Regarding Photographs Which Were Not Shown to Appellant's Counsel Until the Midst of the Trial Presents a Substantial Constitutional Question Concerning a Criminal Defendant's Fourteenth Amendment Due Process Right to a Fair Trial.

The Commonwealth's case was based solely on circumstantial evidence. A circumstantial case is built and sustained through accumulation of circumstances. Defense against such a case consists primarily of a re-

sponse to each circumstance so as to disprove the association of one to another and, at least, weaken the cumulative effect of the sum of the circumstantial evidence. Pursuant to the Circuit Court's order (Ct. Trans. 13), entered in response to appellant's motion for discovery (Ct. Trans. 7-8) and the Commonwealth's reply (Ct. Trans. 12), counsel for appellant met with the sheriff's deputy in charge of the case and inspected all exhibits and real evidence shown to him (T.E. 122-123).

The second day of the trial, as court was about to convene, Defense counsel for the first time was shown a key. This key was introduced in evidence about an hour later and identified as having been found in the search of the person of co-defendant Byrns. That key, according to the deputy, fit the ignition to the car Vittitow was driving (T.E. 122-4, 166). Appellant had no opportunity to examine or test the key, to consider it, or prepare any response to its introduction more than midway through the trial. Appellant objected and moved to exclude the key from evidence (T.E. 124).

James v. *Commonwealth,* Ky., 482 S. W. 2d 92, 94 (1972), held that a cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced. And this is the case at bar.

In reply to discovery motions of the appellant pursuant to RCr 7.24 and *Brady* v. *Maryland,* 373 U. S. 83 (1963), the Commonwealth Attorney stated: "Any photographs, exhibits, maps, or diagrams in the pos-

session of the Commonwealth will be used in the trial and entered into evidence" (Ct. Trans. 12) The Commonwealth agreed to inspection by appellant of all such evidence and asserted that it had none it was hiding (Id.).

Photographs of boot prints and the boots worn by Vittitow at the time of his arrest were introduced by the Commonwealth into evidence. The boot prints in the photos were clearly and distinctly not those of Vittitow (T.E. 64-6; 73; 187).

Throughout the trial, until appellant pointed out the clear distinction between the prints and boots, the Comonwealth took great pains to show that the prints found on the ground appeared at the location of the burglar's jump, that the prints had been carefully preserved, and the photos were taken of the spot "where the subject was supposed to have jumped off the store roof (T.E. 65-6; 97-8; 110-4). But, Major Woods, last witness for the Commonwealth, and the one who produced the key from Byrns, added a new element to the boot print circumstance. When asked if the photographic exhibits represented the way the prints looked at the crime scene, he stated: "Not all of them. They didn't turn out. We was unable to get them" (T.E. 161).

These unclear photos were never shown to appellant or the jury. He was never advised of the existence of other prints or photos or photographic attempts. He was advised by the photographer, Al Burnett, a well-qualified man with twenty-one years experience in scientific law enforcement investigation

(T.E. 67) that the photos he produced were those of the ones he saw (T.E. 64-6). *And the prints did not match the boots.* (Emphasis ours.) Thus, Vittitow's comparison of the soles of his boots with the photos proved that he was not the one who made the impression in the ground where the burglars escaped.

The deputy sheriff's vague qualification of the testimony of all preceding witnesses through references to photos of "other boot prints that didn't turn out" did effectively weaken the disproof of Vittitow's part in making the prints. And appellant had no opportunity to know of or examine these unclear photos.

While the deputy sheriff did not categorically assert that the unclear boot prints matched Vittitow's boots, Vittitow had established that those shown did not, and the belated references to "similarity" circumvented the evidence and deprived the appellant of a crucial part of his defense. The game played by the Commonwealth was manifestly unfair to the appellant, and the Court should notice this substantial error upon a critical issue at trial. RCr 9.26.

CONCLUSION

The conviction of Raymond Vittitow of grand larceny was based solely on evidence of his "presence" in the community where the burglary occurred and strictly on unspecified association with Byrns, the captured suspect on the night of the crime. While there may be inferred that circumstances surrounding his arrest were unusual, there was no evidence, circum-

stantial or real, of any specific or general action by him to warrant the charge of the commission of the act of *grand larceny.*

The circumstantial case of the Commonwealth of Kentucky in the trial below was made out to convince the jury that Mr. Vittitow was one of three men who burglarized a drug store. The jury was not convinced as they brought back an acquittal on that count. But the jury had to create a "theory of the case", one of guilt by "being in the wrong place at the wrong time". Such theory is without support and it should not stand, but the judgment should be reversed.

We respectfuly submit that the Court should grant the Petition because the three issues stated herein present substantial Constitutional questions concerning a criminal defendant's Fourteenth Amendment due process right to a fair trial.

Respectfully submitted,

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